

PROPOSED AMENDEMENT OF INTERNAL RULE 23QUINQUIES(3)

CURRENT LANGUAGE: Internal Rule 23quinquies(3)

3. In deciding the modes of implementation of the awards, the Chamber may, in respect of each award, either:

- a) Order that the costs of the award shall be borne by the convicted person; or
- b) Recognize that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.

PROPOSED AMENDED LANGUAGE: Internal Rule 23quinquies(3)

French

3. En statuant sur le mode de mise en œuvre des réparations, la Chambre **doit**, s'agissant de chaque réparation décidé qu'elle sera mise à la charge de la personne déclarée coupable. **Concomitamment, mais non de façon alternative, la Chambre peut reconnaître qu'un projet spécifique constitue une réponse appropriée à une demande de réparation sollicitée par les co-avocats principaux et permettre à une tierce partie de la mettre** en œuvre. Un tel projet doit avoir été élaboré ou identifié en coopération avec la Section d'appui aux victimes et doit avoir obtenu des garanties suffisantes de financement

English

In deciding the modes of implementation of awards, the Chamber **shall**, in respect of each award that the costs for the award be borne by the convicted person. **At the same time, and not as an alternative, the Chamber may** recognize that a specific project appropriately gives effect to an award sought by the Lead Co-Lawyers and **allow a third party to implement the said project**. Such a project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.

Khmer

លោក លោកស្រីមេធាវីជាតិគោរព

សូមមេត្តាស្វែងរកឯកសារសេចក្តីព្រៀងនៃសំណើសុំវិសោធនកម្មវិធានផ្ទៃក្នុងដើម្បីផ្ញើរជូន
គណកម្មការវិធានផ្ទៃក្នុង និងនីតិវិធីនៅថ្ងៃនេះ ត្រឹមម៉ោង ៤រសៀលនេះ ។

ភាសានៃសំណើសុំនេះត្រូវបានសម្រួលឱ្យងាយស្រួលយល់ សូមមេត្តាមើលឯកសារភ្ជាប់ខាងលើ
ជាភាសាបារាំង និងអង់គ្លេស ។

ភាសានៃសំណើសុំវិសោធនកម្មវិធានផ្ទៃក្នុង៖ វិធាន២៣ ស្ទួនបួន(៣)នៃ វិធានផ្ទៃក្នុង

ជាភាសាបារាំង

៣. នៅពេលសម្រេចអំពីបែបបទនៃការអនុវត្តសំណង ពាក់ព័ន្ធនឹងសំណងនីមួយៗ
អង្គជំនុំជម្រះត្រូវបង្កប់ថា សោហ៊ុយនៃសំណងត្រូវតែជាបន្ទុករបស់ពិរុទ្ធជន ។ ទន្ទឹមគ្នានេះដែរ
និងដោយមិនអាចជំនួសគ្នាបាន អង្គជំនុំជម្រះអាចទទួលស្គាល់ថា
គម្រោងជាក់លាក់ដែលមានលក្ខណៈសមស្របឆ្លើយតបទៅនឹងសំណង
ដែលទាមទារដោយសហមេធាវីនាំមុខតំណាងដើមបណ្តឹងរដ្ឋប្បវេណី និងអនុញ្ញាតឱ្យតតីភាគី
អនុវត្តនូវសំណងនេះបាន ។ គម្រោងបែបនេះ ត្រូវតែបានបង្កើតឡើង
ឬបង្ហាញច្បាស់លាស់ដោយសហការជាមួយអង្គភាពគំរាមជនរងគ្រោះ
ហើយបានធានានូវការផ្តល់មូលនិធិគ្រប់គ្រាន់ពីខាងក្រៅ ។

អង់គ្លេស

**ARGUMENT IN FAVOR OF AMENDING
ECCC INTERNAL RULE 23QUINQUIES(3)**

Currently, the ECCC’s Internal Rule 23*quinqüies*(3) allows the ECCC to implement reparation awards *either* by ordering the convicted person to bear the cost of the award *or* recognizing that a third party project can give effect to the award sought.¹ Although this rule was introduced to protect victims from an indigent defendant, its current wording undermines an important principle established in most domestic and international jurisdictions: that the guilty party is responsible to repair the harm he or she caused. Notwithstanding that the rules permit third parties to financially support and implement reparation awards—an advance in the ECCC reparations scheme welcomed by Civil Parties—third party assistance should serve as a complement to, not a substitute for, the convicted party’s legal duty to pay for reparations.

The Lead Co-Lawyers propose to amend Rule 23*quinqüies*(3) so that all reparation awards are ordered *against* the convicted person who will bear the cost of the award while third parties are permitted to assist with funding and implementation.

- Firstly, such a reparation system would be consistent with the principle of international law that holds that the liable party has primary responsibility to repair the harm he or she caused.
- Secondly, it would ensure that the victims receive reparations, regardless of the convicted person’s financial status at the time of the verdict.
- Thirdly, explicitly awarding reparations against the convicted party would constitute an important reparation *per se*.
- Finally, the amended rule would provide victims with a reparations order that could be enforced in the future, if the financial situation of the guilty party changes; for example, if the defendant acquires new assets or previously hidden assets are discovered.

1. The convicted person bears the legal burden to repair harms resulting from his criminal acts

It is the practice and rule in domestic jurisdictions that the individual or entity found liable for a victim’s harm bears the duty to repair this harm. Moreover, developments in international

¹ Rule 23*quinqüies* (3), Internal Rules (Rev. 8), Extraordinary Chambers in the Courts of Cambodia, 3 August 2011.

criminal law have increasingly put into practice this principle by recognizing the need for reparations between individuals.²

Before the ECCC's rules were revised on 17 September 2010 (Rev. 6), Rule 23*quinquies*(1) stated that reparations "shall be awarded against, and be borne by convicted persons."³ Although, by amending this rule, the ECCC intended to protect victims from an indigent defendant by allowing third parties to fund reparations,⁴ the current wording of the rule undermines an important principle of international law that a convicted party bears the legal burden to repair the harm he has caused. This principle is acknowledged by the United Nations in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles)⁵ as well as being enshrined in the reparations regime of the International Criminal Court (ICC).⁶

² Liesbeth Zegveld, "Victims' Reparations Claims and International Criminal Courts: Incompatible Values?," *Journal of International Criminal Justice* 8 (2010): 85 (stating that "The individual perpetrator is not only criminally responsible for the crimes he has committed towards the international community, but also liable for the harm he has caused towards the victims being the object of protection of the criminal norms.").

³ Rule 23*quinquies*(1), Internal Rules (Rev.5), 9 February 2010.

⁴ In its Case 001 judgment, the ECCC noted that: "Where an Accused appear to be indigent, there is currently no mechanism allowing the ECCC to substitute or supplement awards made against them with funds provided by national authorities or other third parties." Judgement, Case File No. 001/18-07-2007/ECCC/TC, Doc. No. E188, para. 664, 26 July 2010 (hereinafter Case 001 Judgement).

⁵ Principle 15, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly, Resolution No. A/RES/60/147, 21 March 2006 (stipulating that "[i]n cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.") (hereinafter UN Basic Principles). As noted by one of the primary architects of the UN Basic Principles, outside organizations "can assist in providing forms of reparation such as the facilitation of truth and rehabilitation services [but] such actions by third parties are in no way a substitute for reparation provided by the principal violator and by the necessary and appropriate redress modalities that a State or international organization can offer." M. Cherif Bassiouni, "International Recognition of Victims' Rights," *Human Rights Law Review* 6 (2006): 275. In addition, the other primary architect of the UN Basic Principles, Theo van Boven, notes that the resolution was adopted without a dissenting vote and should be considered "declaratory of legal standards in the area of victims' rights, in particular the right to a remedy and reparation." Theo van Boven, "Victim's Right to a Remedy and Reparation: the New United Nations Principles and Guidelines," in *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, ed. Carla Ferstman et al. (Leiden: Brill, 2009), 32.

⁶ Article 75(2) of the Rome Statute establishing the ICC provides that: "[t]he Court may make an order *directly against a convicted person* specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." Rome Statute of the International Criminal Court (Rome Statute), 17 July 1998 (emphasis added). In addition, Rule 98(1) provides that "[i]ndividual awards for reparations shall be made *directly against a convicted person*." Rules of Procedure and Evidence (ICC Rules), International Criminal Court, 9 September 2002 (emphasis added).

2. The Convicted person is legally responsible for reparations regardless of his financial status

The alleged indigence of a convicted party has no bearing on the legal duty imposed on him or her to finance reparations awarded by a court. Reparations awards, founded on the principle that a convicted party must provide redress for harms caused by his illegal acts, give effect to the victims' right to reparation. So widely accepted is this principle that, in many jurisdictions, the ability of the offender to pay the judgment is considered as an entirely separate consideration, not to be confused with his legal liability for reparations.

There is ample evidence demonstrating that national courts do not take into account the financial status of the convicted person when awarding reparations to victims. In Rwanda, where domestic courts have ordered sizeable reparation awards to victims, not a single cent has been recovered due to the indigence of the convicted parties.⁷ In the United States, numerous human rights cases have been brought before national courts under the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA). Although in several of these cases, the courts have made substantial reparations awards, there has been successful recovery in only a few cases.⁸ Nevertheless, these courts continue to grant reparations without consideration to the financial means of the convicted person.

International courts also abide by this principle. For instance, the reparations regime of the ICC, which is the most similar to that of the ECCC, does not have explicit rules addressing the indigent defendant. The rules of the ICC do not require that the financial situation of the convicted person is taken into account in determining reparation awards. Moreover, although the Inter-American Court of Human Rights (IACtHR) issues reparations orders against states and not individuals, it has ruled that the state's financial hardship does not bar the award of reparations.⁹

Notably the Internal Rules of the ECCC anticipate potential difficulties in recovering reparation awards against a convicted party and provide a post-judgment procedural mechanism for dealing with such an eventuality. Rule 113 provides that the enforcement of "reparations granted under Internal Rule 23^{quinquies}(3)(a) shall be done by appropriate

⁷ International Crisis Group, "*International Criminal Tribunal for Rwanda: Justice Delayed*," accessed 30 January 2012, available at <http://www.crisisgroup.org/~media/Files/africa/central-africa/rwanda/International%20Criminal%20Tribunal%20for%20Rwanda%20Justice%20Delayed.pdf>.

⁸ The Redress Trust, "*Enforcement of Awards for Victims of Torture and Other International Crimes*," accessed 30 January 2012, available at <http://www.redress.org/downloads/publications/masterenforcement%2030%20May%202006.pdf>.

⁹ In *Aloeboetoe v. Suriname*, the respondent State submitted that the reparations and costs awarded by the Court were excessively burdensome and "not in line with the current social and economic circumstances in Suriname," yet the Court awarded a broad spectrum of reparations against the State while explicitly reaffirming the right to reparation as a customary norm of international law. *Aloeboetoe et al. v. Suriname*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15 at 25 (10 Sept. 1993), 34 and 47.

national authorities in accordance with Cambodian law.”¹⁰ With a procedural mechanism already in place that relies on established Cambodian law and mirrors the practice of other national jurisdictions in leaving questions of indigence and recovery to the post-reparations judgment period, there is no reason to allow the finances of a convicted person to preclude a reparations award against him. However, under the current formulation of the rule, if the ECCC awards reparations in accordance with Rule 23*quinqies*(3)(b), the victims will be left without a legal remedy against a defendant whose assets may later be discovered or whose financial circumstances may improve.

3. The reparation order is, *per se*, an important form of reparation

Reparation orders hold tremendous symbolic value for Civil Parties and victims and, accordingly, represent a vital form of reparation in and of themselves. Victims of wrong doing, particularly the crimes adjudicated by the ECCC, yearn for acknowledgment of their suffering and an official determination of those responsible. The symbolism of a judgment on reparations is strengthened when the legal responsibility for reparations is expressly borne by the convicted person, even when a third party may be involved in financing and implementing such reparations where necessary. Conversely, when the legal duty to repair their harms remains ambiguous or unassigned, it undermines the message of justice inherent in the judgment rendered, breaks the essential link between the acts of the convicted party and his responsibility to repair the harm caused, and violates the right of the victim to reparation from the person found legally responsible for their suffering.

Though the form and content of the reparation order itself, taken alone, is not a sufficient means of reparation, it carries tremendous symbolic value for victims and is a necessary element of effective and adequate reparation. Acknowledging this fact, the IACtHR has repeatedly asserted in its jurisprudence that the judgment *per se* is a form of reparation.¹¹

The symbolic and cathartic benefits of reparations are significantly diminished when the convicted perpetrator is not held responsible for the reparations. Support for this view is also found with experts in the field of reparations and victims’ rights. REDRESS asserts that a reparations judgment issued by a court or other official body is important for the survivors because it symbolically affirms the survivor’s status and the worthiness of his claim.¹² Taking this into consideration, it is easy to understand the importance of clearly and accurately assigning the legal responsibility for reparations to the convicted party.

¹⁰ Rule 113, Internal Rules (Rev. 8).

¹¹ See e.g. *Myrna Mack Chang v. Guatemala*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., 25 Nov. 2003 (Ser. C) No. 101.

¹² The REDRESS Trust, “*Torture Survivors’ Perception of Reparation: Preliminary Survey*,” accessed 31 January 2012, available at <http://www.redress.org/downloads/reparation/TSPR.pdf>.

The ECCC is one of just two international courts that endorse victims' rights by granting them the power to seek reparations directly from the individual responsible for their harm. By making it unequivocally clear that the convicted party bears the ultimate legal responsibility for repairing such harm, the ECCC would affirm its respect for victims' rights and commitment to uphold international principles of reparation while enhancing the symbolic value and reparative effect of its reparation awards.

4. Conclusion and Recommendation for Amendment to Internal Rule 23quinquies(3)

Civil Parties before the ECCC understand the distinction between a reparation ordered against a convicted party versus one intended to address their harms, but not explicitly ordered against the convicted party. They also understand that enforcing an award against a convicted party may prove a challenging endeavor and that recovery may not occur. In this regard, Civil Parties heartily support the kind of third party engagement in the reparations process that Rule 23quinquies(3)(b) envisages. Through this amendment, Civil Parties seek to ensure that the legal obligation to repair their harm rests firmly with the convicted person, even if third parties assist in financing and implementing reparations ordered by this court. The amendment to Rule 23quinquies(3)(b) proposed here ensures that this will be the case.

Pursuant to the foregoing arguments, Lead Co-Lawyers and Civil Party Lawyers respectfully request that Internal Rule 23quinquies(3) be amended to read as follows:

(3) In deciding the modes of implementation of awards, the Chamber shall, in respect of each award that the costs for the award be borne by the convicted person. At the same time, and not as an alternative, the Chamber may recognize that a specific project appropriately gives effect to an award sought by the Lead Co-Lawyers and allow a third party to implement the said project. Such a project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.

CLARIFICATION OF THE POSITION OF NATIONAL LEAD CO-LAWYERS

The National Lead Co-Lawyer believes that with this proposed amendment, we will be led to the situation that we do not know if a project of reparation will be clear regarding its modality of reparation or not (in the charge of accused or external funding?).

Through the reading of this proposal, it leads to understand that, in principle, the reparation is in the charge of the accused, but additionally the chamber can decide it is in the charge of an external funding. So this creates a situation that we are not clear at the final stage, a reparation will be in the charge of accused or external funding. So this proposal does not correspond to the spirit of the Internal Rules. The actual version is clear enough on this point as it requires that we are clear for a reparation project, in the final claim, it is in the charge of accused or it is a project with external funding.